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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-437, 73-457, 73-464

MOBIL OIL CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

MUNICIPAL DISTRIBUTORS GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINIONS BELOW

The Opinion of the Court of Appeals (Mob. Pet. App. 5-64)[1] is reported at 483 F.2d 880. The Commission's Opinion No. 598 (J.A. II, 559-668) is reported at 46 F.P.C. 86 and its Opinion No. 598-A on rehearing (J.A. II, 866-879) is reported at 46 F.P.C. 633.

JURISDICTION

The judgment of the Court of Appeals (Mob. Pet. App. 1-2) was entered on April 16, 1973 and petitions for rehearing were denied by Order of June 11, 1973. On June 18, 1973, Mr. Justice Powell extended the time for filing petitions for a writ of certiorari to September 10, 1973. The petitions for writ of certiorari were filed on September 6, and 10, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Commission had the power to forgive a quarter of a billion dollars in refunds ordered by a final Commission decision in a previous area rate proceeding which had been held to be free of error by the Court of Appeals, because the present Commissioners disagreed with policy determinations underlying two aspects of the cost determination in the previous decision.

2. Whether the Court below properly affirmed the Commission's approval of provisions for refund credits and contingent escalations of flowing gas rates, calculated to provide gas producers with more than three quarters

[1] In this brief the citation (Mob. Pet. App. ——) refers to the Appendix to the Petition for a Writ of Certiorari filed in Case No. 73-437 on September 6, 1973. Citations to (J.A. ——, ——) refer to the several volumes of the printed joint appendix in the court below which have been lodged with the Court.

of a billion dollars in excess of the just and reasonable rates fixed on a cost basis for gas from the Southern Louisiana Area, and admittedly discriminatory in their effect on both producers and gas consumers.

3. Whether the Commission erred in pricing casinghead gas at the same rate as gas well gas.

4. Whether the Commission's acceptance without modification of a "settlement package" presented by a consensus of the industry parties to an area rate proceeding, but opposed by other parties thereto, was a proper exercise of its regulatory responsibilities under the Natural Gas Act.

STATUTES INVOLVED

The relevant provisions of Sections 4, 5 and 19 of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w, are set out in Appendix D to the Petition in Case No. 73-437 (Mob. Pet. App. 65-69).

STATEMENT

The instant action by the Public Service Commission of the State of New York ("New York") brings before this Court important and novel questions presented by the Federal Power Commission's 1971 prescription of area rates for the prolific Southern Louisiana production area,[2] which were not presented in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). This Court's decision in *Permian* gave general approval to the Commission's determination to fix the maximum rates at which producers may sell natural gas in interstate com-

[2] The Southern Louisiana area is the most important single gas production area in the country. In 1969 it accounted for 39 per cent of the volume and 43 per cent of the cost of all gas sold to interstate pipelines. The fourteen largest sellers of gas in Southern Louisiana —all major oil companies—accounted for more than 75 per cent of the total sales.

merce on an area basis and to its determination to provide separate rates for new and old gas.

In the present case, the second proceeding decided by the Commission with respect to gas production from the Southern Louisiana area, the Commission, with some modifications, followed its previous opinions in *Permian* and the several other area rate proceedings decided prior to mid-1971 in fixing separate area rates for new and old gas primarily on the basis of its evaluation of the costs of such production. In addition, however, pursuant to the provisions of a "settlement package" sponsored by some of the parties to the proceeding, it excused producers from any further obligation with respect to approximately $225,000,000 in refunds due under its previous Southern Louisiana Area Rate decision and provided for a so-called "refund credit" under which the remaining $150,000,000 in refunds could be forgiven upon the dedication of additional reserves at the higher just and reasonable new gas rates it established. It also provided for a series of contingent escalations of the rates for flowing gas which could provide additional revenues to the producers estimated to amount to $750,000,000. The propriety under the stardards of the Natural Gas Act of these massive non-cost supplements to area rates already greatly in excess of those established for the same area three years earlier is the primary focus of the present brief.

Background

As of the time of this Court's decision in the *Permian Basin Area Rate Cases, supra*, the Federal Power Commission had already initiated three other area rate proceedings, involving the Southern Louisiana (Docket No. AR61-2), Hugoton-Anadarko (Docket No. AR64-1) and Texas Gulf Coast (Docket No. AR64-2) production areas respectively. The hearings in the Southern Louisiana case had been completed, an Initial Decision of the Presid-

ing Examiner had been issued, exceptions filed and oral argument held.

On September 25, 1968 the Commission by its Opinion No. 546 issued its final decision in the *Southern Louisiana Area Rate Proceeding*, 40 F.P.C. 530, J.A. IV, 512d.[3] The Commission's decision, following the approach it had taken in *Permian*, established separate rates for gas well gas produced pursuant to contracts entered into prior to January, 1961—the approximate date by which producers achieved a capacity for directional drilling for gas as contrasted with oil, and thus made the price for new gas sales a significant factor in the search for gas—and for gas contracted for between that date and the date of its opinion. The former "first vintage" rates, which, as in *Permian*, were also applied to all casinghead gas, were set on the basis of an historical cost study at 17 cents per Mcf for gas produced in the offshore federal domain not subject to state taxation, and at 18.5 cents per Mcf for onshore gas subject to the Louisiana severance tax. The newer "second vintage" rates were fixed on the basis of a cost study of the current costs of finding and producing non-associated ("gas well") gas, including an adequate return, which showed offshore costs of 16.5 cents and onshore costs, including severance tax, of 18.8 cents. But the Commission in recognition of the lack of precision of its costing techniques and because it was imposing an indefinite moritorium on increases in the rates, fixed the maximum just and reasonable ceilings therefor at 18.0 and 19.5 cents per Mcf, respectively. Moreover, in a departure from *Permian*, a new "third vintage" rate level was established for gas sales contracted for after the Commission's decision, with rates of 18.5 and 20.0 cents per Mcf, respectively, applied to

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[3] We refer to this Commission decision throughout this brief as *"Southern Louisiana I"* or "Opinion No. 546".

this gas. Refunds of sums collected by producers in excess of these rates were ordered by the Commission.

On rehearing (41 F.P.C. 301) the Commission reaffirmed these determinations and expressly rejected requests to stay payments of the refunds it had ordered (41 F.P.C. at 338). A stay was, however, secured by the producers from the Court of Appeals for the Fifth Circuit pending review of the Commission's opinion therein. Review of the decision was sought both by producers asserting that the rates were too low and by consumer interests asserting that they were too high. However, in *Southern Louisiana Area Rate Cases (Austral Oil Co.* v. *Federal Power Commission)*, 428 F.2d 407, 444 F.2d 125 (5th Cir., 1970), the Commission's decision was "sustained in full" (428 F.2d at 441), despite the court's expressed doubts as to whether the Commission had properly explained the basis for the non-cost elements of its rates (428 F.2d at 427, 441) or had given adequate attention to the effect of its action on gas supply or industry structure (428 F.2d at 434-440, 441-443). The Commission's utilization of a 12% rate of return in both its cost studies was expressly affirmed (428 F.2d at 431-432) as were the other producer challenges to the Commission's costing techniques (428 F.2d at 432-434). The Court made clear, however, that its mandate was not intended to preclude the Commission from changing the approved rates in the new area rate proceedings involving Southern Louisiana which the Commission had initiated (428 F.2d at 445).

A number of petitions for rehearing were filed, directed *inter alia*, to the scope of the Commission's new proceedings. Pursuant to the court's request for responsive pleadings, the Commission indicated its doubts as to whether a court which had affirmed an agency action could authorize any retrospective reopening of that action and asked, instead, that the Court remand the case to the

Commission (J.A. II, 746-749). The court in a brief *per curiam* opinion on rehearing, stated that it intended to permit the Commission to "reopen *any* part of its order that circumstances require be reopened" and that the Commission could make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest so required (444 F.2d at 126-127). At the same time, the court "emphasized" that its judgment was "an affirmance and not a remand," as the Commission had requested (*id.* at 127). And with specific reference to the refund situation, the court stated (*ibid.*):

> ". . . it may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion or delay that would result from their reopening. Or it may be that the refunds are too burdensome *in the light of new evidence* to be in the public interest. *In that case*, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders" (emphasis added).

Petitions for certiorari were filed by a number of parties, including New York. In its brief in opposition, the Commission stated (at p. 15) that evidence concerning the present and future gas supply had been introduced in the new Southern Louisiana proceedings, and that in its opinion it would not be in the public interest to order the refunding of $375,000,000 then owed by the producers until it could be determined in the light of that evidence "(1) the effect the rules would have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas." This Court denied the petitions for certiorari. *Municipal Distributors Group* v. *Federal Power Commission*, 400 U.S. 950 (1970).

The Present Proceeding

The Commission, at the time it denied rehearing of its opinion in the earlier *Southern Louisiana Area Rate Proceeding* had initiated a new proceeding (AR 69-1) with respect to the area. This proceeding was originally limited to a determination whether rates for third vintage gas well gas from offshore Southern Louisiana should be increased, or fourth vintage ceilings established (J.A. I, 1-16, 41 F.P.C. 378). However, by order of December 15, 1969 (J.A. I, 73-89), the Commission enlarged the scope of this proceeding to include review of the rates for all vintages of gas from the entire Southern Louisiana area. Early in the course of the hearings, a settlement conference was convened at the request of some of the parties (J.A. I, 92-93), and negotiations proceeded, parallel with the hearings, throughout much of 1970.

On November 6, 1970, a motion was made by one of the parties to these discussions "for promulgation of a settlement proposal" for resolution of the proceeding (J.A. I, 669-702). This proposal provided for rates for all new gas (sales under contracts dated after October 1, 1968) of 26 cents per Mcf, both onshore and offshore, and for all other "flowing gas" at 22.375 cents onshore and 21.375 cents offshore, with automatic escalations of 0.5 cents for flowing gas of October 1, 1973 and of 1.0 cents for new gas as of October 1, 1974. In addition, all refunds due under its earlier opinion were to be forgiven except for an amount fixed by a complex formula at $150,000,000, and the producers were authorized to work-off payment of even this amount by commitment of additional gas reserves at the higher new gas rates. The settlement proposal also provided for a series of 0.5 cent per Mcf contingent escalations of flowing gas rates in the event producers dedicated specified amounts of reserves to the interstate market by October 1, 1977.

The Commission on November 9, 1970, noticed the settlement proposal and asked for comments thereon (J.A. I, 139). A large number of responses were filed, including objections to the adoption of the settlement by several major producers, New York (J.A. I, 256-277), the City of Memphis, and the American Public Gas Association. On December 24, 1970, the Commission issued an order (J.A. I, 352-354, 44 F.P.C. 1638), which reopened its earlier Southern Louisiana proceeding (Docket No. AR62-1), consolidated it with the new Southern Louisiana proceeding (AR69-1), and provided that any additional evidence in the consolidated hearing was to be filed by February 15, 1971. In the same order, the Commission incorporated into the record of the consolidated proceeding the settlement proposal referred to above. On January 26, 1971 the consolidated proceeding was further expanded to apply to all Section 4 rate suspension proceedings and Section 7 certificate proceedings involving sales in the area which had been or might be instituted during the course of the proceeding (J.A. I, 360-361). And, on March 15, 1971, the Commission granted a motion to waive the filing of an Intermediate Decision by the Presiding Examiner and providing for the omission of oral argument before the Commission (J.A. I, 364-368).

On July 16, 1971, the Commission issued its final Opinion and Order in the consolidated proceeding (Opinion No. 598 (J.A. II, 582-688)).[4] In this opinion the Commission purported to consider the individual aspects of the settlement proposal on their merits rather than as a settlement, in view of the lack of agreement among the parties thereto (J.A. II, 594). But its decision approved the settlement in its entirety, without any modification. In so doing, it made clear that its determinations on key points were influenced by the fact that the settlement proposal had

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[4] We refer to this Opinion in this brief variously as *"Southern Louisiana II"* or "Opinion No. 598".

wide industry support, including support by distributor groups (J.A. II, 589, 597, 601) and it called "particular attention" to representations by the producers supporting the settlement, that its approval would establish a climate for increasing gas search activities and make a major contribution towards bringing forth gas supplies to meet the demands of all customers supplied by the area (J.A. II, 630). On rehearing, it reaffirmed these views, modifying or clarifying its previous order only to the extent necessary to ensure that it adhered to the letter and intent of the settlement proposal (J.A. II, 866-879).

The Court of Appeals for the Fifth Circuit affirmed the Commission in all particulars (Mob. Pet. App. 5-64). In its opinion, the existence of a critical gas supply shortage and the continuing experimental nature of area pricing gave the Commission broad discretion in determining the appropriate ceiling rates for sales of both flowing and new gas, and the Commission's acceptance of the terms of the proposed settlement, was fully within its discretionary authority (Mobil App. 13, 20-27). Specifically, it upheld as reasonable exercises of such discretion, the reduction in outstanding refund obligations by about $250,000,000, the refund credit provisions applicable to the remaining $150,000,000 obligation, and the contingent escalations of flowing gas rates. The possible discriminatory aspects of the latter two provisions, the Court concluded (Mob. App. 45-51), were not fatal since all producers would secure some benefit from the Commission's action and rate relief to consumers was less significant in the circumstances than the potential for larger gas dedications if producer revenues were increased.

SUMMARY OF ARGUMENT

The Federal Power Commission in the Opinion under review approved, without modification, a "settlement" proposal sponsored by most of the industry parties to its

most recent proceeding to fix producer rates for sales of natural gas from the crucial Southern Lousiana production area. The approved plan fixed the rates for "new gas", defined as all sales made since its 1968 decision in *Southern Louisiana I*, at a level of 26 cents per Mcf for both onshore gas subject to the Louisiana severance tax and offshore gas which is not, with an additional one cent escalation due to become effective in October, 1974. This rate was from 6-7½ cents per Mcf higher than the rate for new gas it had fixed three years earlier. At the same time, rates for all "flowing gas", including both first and second vintage gas which had previously been priced separately, were set at 22.375 cents onshore and 22.375 cents offshore, with a half cent escalation to become effective on October, 1973. These latter rates involved increases of from 2.875 cents to 4.375 cents per Mcf over the 1968 rates for the same gas.

While New York disagrees with a number of the underlying bases upon which the Commission's justification for these rate levels rest, we have not challenged their prospective operation in the present review proceeding, except with respect to the provision of the Commissioner's order which treats casinghead gas the same as gas well gas. In view of the current gas supply crisis we are prepared, with this one exception, to accept the Commission's ultimate finding that these rates were set at "the appropriate level which will elicit exploratory and developmental effort in Southern Louisiana" (J.A.II, 642). Our basic disagreement with the Commission's decision lies, instead, in its approval of a number of provisions of the settlement agreement, which have the effect of forgiving about $400,000,000 in refunds for charges made by producers prior to the Commission's decision here at rates in excess of the just and reasonable levels it had adopted in *Southern Louisiana I*, together with a provision for contingent escalations of the flowing gas rates in the area which can add an additional $750,000,000 to

the costs to be borne by the gas consumers securing gas from the area.

Of this more than billion dollar bonus which the settlement proposal added to the higher new rate levels, approximately $225,000,000 stems from the Commission's action in retroactively increasing the rates for gas sold prior to its new decision above the levels fixed in Opinion No. 546 and expressly found to be lawful in *Austral*. It is true that the *Austral* court, while emphasizing that its action was "an affirmance not a remand", stated that, in the exercise of its alleged equitable powers, it was authorizing the Commission to reconsider the refunds it had ordered, if it found on the basis of new evidence that their payment would be contrary to the public interest. But even assuming that the Court could lawfully authorize the Commission to reconsider its refund order in such circumstances, this is not what the Commission did—or could have done on the basis of the record before it. Instead, its sole basis for retrospectively raising the just and reasonable rate levels from which refunds would be ordered, was that the 1971 Commissioners had concluded that the rate of return and expense allowance for exploration and development set by the 1968 Commission was, for undisclosed reasons, "inadequate".

This was not and could not have been the reason the *Austral* court authorized reconsideration of the previous refund order. Moreover, the actual refund levels set by the settlement and approved by the Commission were entirely unrelated to these two factors and the Commission's limited justification for adopting these new "just and reasonable" levels are entirely unrelated to any cost determination. They are, moreover, equally unrelated to any proper standard of a "just and reasonable" rate.

Neither the Commission's opinion nor the court below, provides any serious justification for the contingent escalation of flowing gas rates by amounts which could approach three quarters of a billion dollars, except for the bare contention that it is a useful "incentive" which the Commission was free to accept as part of the "settlement package". While the proposal is apparently intended to induce a greater area gas search effort on behalf of the interstate market, there is no showing that this greater new effort would not be forthcoming at the substantially higher rates for new gas which were being established. The bonus is to be paid for dedicating new gas reserves over a *nine* year period in an amount less than half that actually achieved by the industry in the latest *five* year period preceding the Opinion for which statistics were available, and only one quarter of the reserves the Commission found in Opinion No. 598 would be required for adequate service in the succeeding *seven* years. Moreover, the settlement's plan for contingent escalation of flowing gas admittedly was highly discriminatory both among the existing producers and the pipeline purchasers in the area, and against new entrants into area gas production. But such contentions were brushed off by both the Commission and the court below. In contrast, the District of Columbia Circuit in *Public Service Commission* v. *Federal Power Commission*, 487 F.2d 1043, 1068-1077 (D.C. Cir., 1973), pending on petitions for writ of certiorari, Case Nos. 73-966 *et al*,[5] recently set aside similar provisions incorporated into the Commission's contemporaneous decision in its *Texas Gulf Coast Area Rate Proceeding*, 45 F.P.C. 674.

Finally, the Commission's Opinion provides that the $150,000,000 in revenues which it does not excuse absolutely, may be written off over a period of years by

[5] For convenience we refer throughout this brief to the District of Columbia Circuit's decision as the "*Texas Gulf Coast* cases".

the producer involved through his dedication of new gas reserves to the interstate market. Again there is no Commission finding or record showing that this provision of the settlement, which in effect provides a few large producers who had been collecting excessive rates from gas consumers with an additional cent per Mcf for their new gas, can or will serve to materially enhance the total gas supply in the area. Nor is there any Commission or lower court justification for its discriminatory features, including the specification that the pipelines from whom the excess revenues were wrongfully extracted may receive only one-half of the new reserves, and may not secure even this amount if they are for some reason unable to take the new gas when offered. The Court in the *Texas Gulf Coast* cases, *supra*, properly held that the similar provisions there were completely unsupported by competent findings or record evidence.

Underlying the specific Commission errors discussed above, is the improper Commission view as to the nature of the consideration it may give to a settlement proposal sponsored by a large number of the parties to the proceeding but contested in whole or part by others. The Commission recognizes that in such circumstances it must treat the settlement proposals solely as a recommendation by some of the parties as to the manner in which the various substantive issues should be resolved on their merits. But while it purports to discuss the individual facets of the "settlement package", it makes clear throughout its opinions, and particularly with respect to the non-cost bonuses, that the specific features of the settlement have been accepted without any real attempt at a quantitative or qualitative analysis, simply because they bore the *imprimatuer* of the settlement's sponsors. This results in an improper delegation of the Commission's regulatory powers to the groups being regulated which is inconsistent with its duties under the Natural Gas Act.

ARGUMENT

I. THE RETROSPECTIVE INCREASE IN THE RATES APPROVED IN THE COMMISSION'S PREVIOUS AREA RATE ORDER AND AFFIRMED ON COURT REVIEW TO PROVIDE PRODUCERS WITH AN ADDITIONAL $225,000,000 IS WITHOUT LEGAL OR FACTUAL SUPPORT

A principal result of the Commission's action in approving the industry sponsored settlement, was to retrospectively increase the just and reasonable rates for flowing gas sold in the area (including the oldest sales entered in prior to January 1, 1961) by approximately $225,000,000. The effect of such action was to wipe out that portion of the refund obligation owed by the producers who had charged rates found to have been in excess of the just and reasonable maximum fixed in *Southern Louisiana I*, and continued to charge such excessive rates pursuant to court and Commission stays.[6] As we show below, the quarter of a billion dollar gift was not authorized by the court of appeals decision in *Austral Oil Co.* v. *Federal Power Commission*, *supra*. We also show that, even if the Commission could properly have been authorized to make a retrospective change in rates it had previously adopted in a final order approved by the reviewing court where such change could be shown to benefit gas consumers in the future, the Commission's actions here in eliminating 60% of the refunds it had ordered in its previous area rate case, are not based upon any such claim, or any record support, but are merely arbitrary actions taken to conform to a "settle-

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[6] It is to be contrasted with the provisions of the Commission's order under which the remaining $150,000,000 of original $375,000,000 refund obligation could be forgiven upon the producers' dedication of new gas to the interstate market, discussed, *infra*, at Part II of this brief.

ment" proposal sponsored by many of the industry parties to the proceeding.

A. The Court of Appeals' Order on Rehearing in the *Austral* Case Could Not Authorize the Commission's Action

The Commission in *Southern Louisiana I* fixed the maximum just and reasonable rates for gas sold under contracts entered into prior to January 1, 1961 at 18.5 cents/Mcf onshore and 17.0 cents/Mcf offshore, and at 19.5 cents/Mcf onshore and 18.0 cents/Mcf offshore for gas produced from contracts entered into from January 1, 1961 to October 1, 1968. See *Southern Louisiana I*, *supra*, 40 F.P.C. 530 at 648. Revenues which had been collected by producers at rates in excess of those maxima were ordered to be refunded with interest. *Id.* at. 626-628. These rates were challenged by the producers on judicial review as being too low, with the 12% rate of return utilized by the Commission for both first and second vintages, and the methods it utilized for determining unsuccessful exploration and development expenses being both subject to express claims of invalidity. But the Fifth Circuit Court of Appeals, in *Austral Oil Co.*, *supra*, affirmed the Commission's rate determinations, including those related to rate of return, 428 F.2d at 431-432, and (though somewhat less explicitly) exploration and development expenses. 428 F.2d at 432-434.

The Court was, however, less sure about whether the Commission had adequately taken into account the effect of its opinion on industry structure and gas supply, and upon the continuing willingness and ability of the production segment of the industry to conduct the optimum gas search effort required by the public interest. Accordingly, while it expressly affirmed the Commission order under review, it stated that its action would not preclude the Commission, in the new *Southern Louisiana*

Area Rate Proceeding (Docket AR69-1) then underway, from taking appropriate action to "change the rates we have approved here" (428 F.2d at 445). And, citing Section 16 of the Natural Gas Act, it rejected claims that "the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous" (*Ibid.*).

On rehearing, the producers and the Commission pointed out that since the Commission's orders had been affirmed, it was doubtful whether the Commission had authority under the Natural Gas Act to order any but prospective relief, which would not affect the refunds already ordered. Because of this problem the Commission expressly asked that the Court set aside the affirmance and remand the case to it for appropriate further proceedings. This the Court expressly refused to do. Instead, in its order on rehearing, 444 F.2d 127-128, it stressed that its action was "an affirmance not a remand". It, however, stated that, under Section 19(b) of the Natural Gas Act and its own powers as a court of equity, it had the authority to authorize the Commission in the new proceedings to take both retrospective and prospective action to the extent it was otherwise appropriate in light of new evidence. More specifically with respect to the refunds which the Commission had ordered the court said that "it may be that the refunds are too burdensome in the light of the new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and duty to remedy the situation by changing its orders. In all other respects, the original decision of this Court is the final disposition of this appeal." (448 F.2d at 127).

New York continues to have grave doubts as to whether this order of the court of appeals, which does *not* sit as a court of equity in reviewing actions of an ad-

ministrative agency, see *Federal Radio Commission* v. *General Electric Company*, 281 U.S. 464, is appropriate under the provisions of Section 19(b) of the Natural Gas Act, which only authorizes the reviewing courts "to affirm, modify, or set aside [Commission] orders in whole or in part." The fact that a court might believe that a final agency order[7] free of legal error was unwise does not appear to empower it to authorize the Commission to retrospectively change its decision. But the Court does not have to reach the question which was raised in the petitions for certiorari from the court of appeals' decision in *Austral* as to the general authority of the courts to authorize retrospective reopening of final agency orders they have affirmed.[8] For, even assuming the court of appeals had the power to authorize the Commission to change a final valid decision in the special circumstances presented in *Austral*, it is clear that its authorization was limited to circumstances in which "in the light of the new evidence" the Commission could properly conclude that immediate payment of the refund by the producers was "too burdensome . . . to be in the public interest", *i.e.*, would substantially and adversely affect the producers' ability to meet the continuing gas needs of the interstate market.

This is, however, exactly what the Commission did *not* conclude in the further proceedings as justification for the absolute foregiveness of almost a quarter of a billion dollars in refunds due under its original Southern

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[7] Upon the filing of the administrative record in the court of appeals, the court's jurisdiction, under the express terms of Section 19(b), becomes exclusive, and the Commission loses its power to modify the order.

[8] Both New York and the petitioner MDG, who had raised the general issue of court authority in petitions for certiorari in the *Austral* case, preserved the issue throughout the subsequent administrative and judicial proceedings after the denial of certiorari at 400 U.S. 950. It is, of course, clear that denial of certiorari is not a holding on the merits.

Louisiana order. Instead, the sole findings made by the Commission in Opinion No. 598 to support the absolute remission of this large portion of the refund obligations was that "Opinion No. 546 did not afford an adequate return and it understated the requirements for exploration and development" (J.A. I, 653).[9] These findings, whatever their relevance to a prospective revision of the rates for flowing gas were clearly not what the panel of the court of appeals which heard the *Austral* case intended by its purported limited exercise of equitable powers. And, the Commission, itself, so recognized at the time.[10]

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[9] Section 19(b) of the Act provides that parties to court review proceedings may apply to the court for leave to adduce additional evidence, if they can show its materiality and there were reasonable grounds for failing to adduce it in the proceedings before the Commission. The court is authorized to order such additional evidence to be taken by the Commission which can then modify its order "as to the facts by reason of the additional evidence so taken and file with the court its modified or new findings and its recommendation, if any, for the modification or setting aside of the original order."

The producer petitioners in the *Austral* case filed a motion to adduce additional evidence. But it was limited to evidence with respect to the supply situation and did not seek to adduce new evidence on rate of return or exploration and development costs. In any event, no affirmative action was taken by the Court. To the extent the Commission's request on rehearing that the Court remand the case to it can be treated as an application under Section 19(b) to adduce new evidence (and it was not so entitled) no suggestion was contained therein that new evidence as to rate of return or exploration or development costs existed which could not have been introduced in the earlier Commission proceedings.

[10] In opposing the petitions for certiorari from *Austral* filed by New York and others, the Commission recognized that the court's mandate was not a *carte blanche* to re-examine the old decision, but rather an opportunity to assess the consequences, if any, of refunding about $375,000,000, in the context of the gas supply situation. Specifically, the Commission's brief in opposition stated (Sup. Ct. Nos. 669, *et al.*, Oct. Term 1970, FPC Brief in Opposition, p. 15):

> "The refunding of approximately $375,000,000 by producers without adequate regard for (1) the effect the rates would

The Court below (Mob. Pet. App. 41, 483 F.2d at 903), brushed aside the arguments as to retrospective increases of rates affirmed by a court on review. The *Austral* decision on rehearing, it held, had rejected the "notion that the label 'affirmance' could possibly impair FPC's ability to alter or modify *any* of the provisions, particularly the refund provisions, if it believed the exigencies of the gas industry required more effective remedial measures." [11] This, however, entirely ignores New York's basic point that the Commission did *not* hold on the basis of either new or old evidence that $225,000,000 in refunds should be excused because the "exigencies of the gas industry required more effective remedial measures." On the contrary, it retroactively raised the rates it had previously fixed because the Commissioners sitting in 1971 concluded that the rate of return and exploration and development costs fixed in 1968, and expressly approved by the *Austral* court, were "inadequate".

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have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas, would not be in the public interest. It must be determined whether all or part of the capital represented by the refund dollars is required for exploration and development before any refund levels are finally determined and ordered."

[11] In so concluding the court below studiedly ignored the language of the *Austral* opinion on rehearing that "We emphasize that our judgment is an affirmance not a remand", as well as its final admonition that "in all other respects, the original opinion of this Court is the final disposition of this appeal."

The Court below suggests that this Court's opinion in *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 stands for the proposition that an agency possesses the power to modify a decision "which has not been unequivocably affirmed by a court of law." As examination of the *Callery* opinion makes clear, what this Court in fact held there is that where a Commission order has been reversed on court review, it can on remand take such steps as are necessary to undue the impact of its illegal order.

We do not suggest that a Commission determination as to the appropriate rate of return, even where it relates to the costs of flowing gas dedicated under contracts from five to twenty years of age, is immutable. Thus, we have not challenged the Commission's utilization of a higher 13% rate of return in fixing the prospective rates for flowing gas in the present case. This is equally the case with respect to the Commission's determination in Opinion No. 598 to accept, albeit with some misgivings (see J.A. II, 645-646), a method of calculating exploration and development expenses it has previously consistently rejected as involving subjective selection on the part of the companies being regulated. While we do not agree with the new method for calculating these expenses, which contrary to the Commission's statement in its Opinion (J.A. II, 645) accounts for considerably more than a penny of the overall price increase, we again did not contend that the Commission's decision to adopt the new method of determining "E & D" expenses in fixing the prospective rates for flowing gas was legally erroneous. But with respect to both rate of return and exploration and development expenses, the possible validity of the Commission's new determinations does not demonstrate the illegality or impropriety of its prior conclusions.

More important, the change in Commission position on these two factors does not demonstrate that effectuation of its original decision in Opinion No. 546 would be contrary to the public interest. Nor did the Commission so hold in Opinion No. 598.

The reason why the Commission was unable to conclude in Opinion No. 598 that adherence to the rates it had previously fixed for flowing gas for the period prior to its new decision would adversely affect the public interest,[12] is simply that there was no evidence in the

[12] In its brief in the court below (pp. 58-59) the Commission suggests that language in its Opinion No. 598 referring to "per-

record which would support such a conclusion. To the extent internally generated revenues from the particular production area are relevant to new investment, the Commission, by prospectively increasing flowing gas rate ceilings to the 22.375 cents per Mcf onshore and 21.375 cents per Mcf offshore, had already increased producer revenues in the area by well over $125,000,000 a year.[13] In fact, one of the stated reasons for setting the prospective flowing gas rates at these high levels was to increase producer cash revenues (see J.A. II, 644, 647). To this amount must be added the increased revenues for the gas sold at 26 cents for all contracts after October 1, 1968. And since only a small portion of flowing gas revenues represent cash outlays (see J.A. II, 647), the re-

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suasive" testimony by UDC witness Winger can be construed as a finding that payment of the refunds ordered in Opinion No. 546 would impair the producer's ability to take advantage of the incentives provided by its new rate structure. But this testimony (J.A. II, 624-626) that "capital formation for gas exploration and development" has been declining, allegedly because of the lack of an appropriate price incentive to explore for gas, does not suggest that if the incentive was sufficient, the producers would still lack access to available resources for exploration and development if the Opinion No. 546 refund obligations were enforced; on the contrary, Mr. Winger himself testified that the price of oil and the internally generated funds from oil play a much greater role in the availability and usage of funds than the price of gas or the funds which are internally generated by sales of gas (J.A. IV, 482-484).

[13] The Commission's Opinion does not attempt to quantify the effect of its action. However, in 1968, total sales from the Southern Louisiana Area totalled 4,456,961 million cubic feet of gas *Sales by Producers of Natural Gas to Interstate Pipelines, 1970*, FPC, 1972, Table E, p. XI. If we assume the increase in revenues authorized in such sales was limited to the 2.865 cent differential between the 19.5 cents price fixed in Opinion No. 546 for onshore gas under contracts between January 1, 1961 and October 1, 1968 and the 22.375 cent price for this gas fixed prospectively as of October 1, 1968 in Opinion No. 598, we get a figure in excess of $127,000,000. In fact, of course, the differential in flowing gas prices for much of the gas between Opinion No. 546 and Opinion No. 598 is much greater than 2.865 cents per Mcf, reaching to 4.365 cents in the case of offshore gas under contracts prior to January 1, 1961.

mainder is available for reinvestment if the incentive is correct.

In any event there is no basis in the record for the producer claim that they are in effect limited to flowing gas revenues from a particular production area, or even from their gas sales as a whole, for the funds for future gas search efforts. As Judge Leventhal, speaking for the District of Columbia Circuit in the *Texas Gulf Coast* cases, *supra*, 487 F. 2d at 1073-1074, said in disposing of a similar producer claims:

> "... It is elementary in the petroleum industry that capital is provided for exploration in an area long before there are any funds flowing from that area—demonstrated, e. g. by the funds invested in Alaska, and in purchase of Gulf Coast off-shore leases offered by the Interior Department.[71] It is obvious that future expenditures in any particular producer area depend on evaluations of future profits, not past or recent receipts from activities begun in the past, at least where, as here, the future operations will be governed by price conditions far more liberal than prevailed at the time current operations were planned and developed. The fact that petroleum company retained earnings were equal to 85% of investment outlays during 1954-1963 [72] does not govern the present inquiry. It reflects both earnings retained out of gas and oil, and investment used for both gas and oil.[73] Investment in an area was not related to earnings

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[71] NY Public Service Commission Brief at 22.

[72] Chase Manhattan Bank: Annual Financial Analysis Petroleum Industry Reports, 1954—1963, and Annual Financial Analysis of 32 Petroleum Companies (33 in years prior to 1963).

[73] The Examiner, 45 FPC at 824-35 assumed that the "comparable earnings" rate of return looked to statistical data of companies, as would seem appropriate for the equity investor in assessing the risk of investing in stocks.

from that area, but rather to a company-wide assessment of funds available and investment opportunities. It reflects the easier availability, and less expense, of use of retained funds, and the approval given that course by stockholders, but does not negate the availability of debt or equity financing.[74] In short, the producers' contention simply does not focus on the core questions involved in any program of enlarging receipts on flowing gas because of the prospect—there is no requirement—that these particular receipts be used for exploration for new gas. Before any such approach could be indulged, there would have to be a more reasoned statement from the Commission of necessity and propriety. Furthermore, the relevant risk to investors in the equity of integrated petroleum companies, would seem to be defined not by the risk of exploration activity but by the risk from the entire operations of the corporation.

While at the margin the cost of raising capital makes retained earnings from current operations a preferred source [75] for funds for new exploration, this does not establish that absent such earnings, all investment will be foregone.[76] What determines the decision to make an investment is the estimate of earnings from the new investment, and if that is projected as a return that justifies the risk, capital will be available. Similarly, if the projected returns do not justify the risk, capital will not be invested even though retained earnings are available from current operations. Firms must assess the opportunity cost of

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[74] *See E. Solomon.* Theory of Financial Management 51-53 (1963).

[75] *See* Joint Appendix, Part II, Vol. 3, at 18, R. 1,832.

[76] Whether retained earnings may be a cheaper source of financing, raises a different question than whether they are the exclusive source. *See Solomon, supra* note 73, at 27 where he states that an investment will be made if "the rate of return it promises (correctly computed from expected outlays and benefits) exceeds the cost of capital."

> investing their retained earnings in new exploration, as opposed to other uses in active, or even passive, investment opportunities."

The closest the Commission comes to a finding which would support action pursuant to the limited *Austral* mandate, is its statement that under its order "available capital will not be diminished by requiring immediate cash refunds." (J.A. II, 629). To the extent that this statement can be characterized as a finding that if a quarter billion dollars of the refunds owed under Opinion No. 546 were not totally excused the capital available for new investment in Southern Louisiana would be inadequate, it is totally unsupported by any record evidence. But in any event, if the Commission had an adequate basis for concluding that the "immediate" repayment of this sum would seriously inhibit the producers ongoing exploration and development efforts, it does not follow that a complete remission of the sum was the appropriate remedy.

On the contrary, in this very case the Commission provided that the remaining $150,000,000 in refunds, which it did not forgive, need not be paid immediately but could be worked off over a period of years through dedications of additional gas to the interstate market. For the reasons discussed below, we believe that the specific refund work off system adopted by the Commission is unduly discriminatory and does not provide adequate protection to the gas consumers who paid the excess rates, but its adoption in this very opinion demonstrates that the Commission had adequate powers to defer the repayment of refunds, or to spread out their period of repayment if, in fact, it was shown to be necessary. But this was not part of the industry sponsored settlement which the Commission was intent on approving "in its entirety" and the Commission therefore allowed the producers to keep the excess revenues without any effort to ensure that they

would be utilized for the benefit of the consumers who had paid them.[14]

B. The Commission's New Refund Levels are not Supported by Any Record Evidence

As indicated above, the Commission's restrospective change in the flowing gas rates it fixed in Opinion No. 546 to reach the $225,000,000 refund foregiveness provided for in the proposed settlement is justified solely on grounds that "Opinion No. 546 did not afford an adequate return and it understated the requirements for explora-

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[14] The Commission compounded its error in excusing refunds for gas sold above the prices found to be just and reasonable in Opinion No. 546 by excusing refunds still owing under some earlier in-line proceedings which had been affirmed on appeal at a 20 cents per Mcf price onshore and 18.5 cents offshore (See *Union Texas Petroleum Corp.*, 32 F.P.C. 254 (1964), remanded for further consideration, *sub nom., Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F.2d 161 (C.A. 10, 1967), *original result reaffirmed*, 40 F.P.C. 1474 (1968)) as long as the excessive rates charged were within the higher levels for refund established by the settlement. As to these refunds, which were not involved in Opinion No. 546, no attempt at justification is made. The only reference to the matter is in the ordering paragraph on refunds (J.A. II, 662) where the refund provisions of the area rate proceeding are simply made applicable to the *Union Texas* case, Docket Nos. G-13221, *et al.*, in accordance with the terms of the settlement proposal (J.A. II, 691).

The result is simply to give additional sums of money to some of the producers involved in the *Union Texas* proceeding to the detriment of consumers and in preference to those producers who had previously paid the refunds due. The anomaly of the resulting situation is pointed up by the case of Superior Oil Company, a principal beneficiary of the Commission's action. It is now permitted to gauge its refund obligations in the *Union Texas* case on the basis of higher settlement rates in a totally unrelated proceeding. But, when it sought to have the in-line price levels in the *Union Texas* case set aside on grounds the Commission has refused to consider the "settlement" prices in that case, its contention was rejected by the Commission and the Courts. See *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F.2d 161 (10th Cir., 1967), certiorari denied *sub nom., Superior Oil Co.* v. *Federal Power Commission*, 391 U.S. 917 (1968).

tion and development." (J.A. II, 653). But the Commission nowhere states what the higher return on exploration and development allowances should have been. On the contrary, its justification for the new levels for flowing gas set forth in the settlement for determining the refunds, and for limiting the total amount thereof to the stipulated $150,000,000 figure, not only are patently invalid on their own terms but admittedly have no relationship to any cost calculations. The essential reason for this bizzare result is that the Commission was attempting to justify a settlement for which on this, as many other matters, there was no evidentiary support whatsoever, despite the Commission's action (J.A. I, 352-354) in reopening the record to afford the settlement's sponsors an opportunity to supply a record basis therefor.

We have set out in tabular form in a footnote the different rate levels fixed for flowing gas (gas sold under contracts dated prior to October 1, 1968) in the two Commission Opinions.[15] As the Court will note, Opinion No. 598 in fixing the price levels governing flowing gas refunds eliminates the distinction made in Opinion No. 546 between first and second vintage gas based on date of contract, the different prices for which had been separately cost justified (see 40 F.P.C. 530, 556, 590). There was substituted therefor four levels for "just and reasonable" price based on date of delivery of the gas rather than time of producer investment. Thus an onshore sale of

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[15] Maximum Just and Reasonable Rate Levels for Flowing Gas, FPC Opinions No. 546 and 598 (Cents per Mcf)

Opinion Nos. 546

	Onshore	Offshore
Contracts Prior to January 1, 1961	18.5	17.0
Contracts After January 1, 1961	19.5	18.0

[Footnote continued on page 28]

gas made in 1967 at one cent above the 21.25 cent price would incur a refund obligation of the same amount as a continuing onshore sale made ten or fifteen years earlier when costs were considerably lower. Why the date of delivery as contrasted with the date of investment should determine the just and reasonable prices is nowhere explained.

The Commission Opinion does purport to provide some justification for the just and reasonable levels set for deliveries before 1965, and between January 1, 1965 and September 30, 1968. The explanations, however, are totally meaningless in terms of the statutory standard. Thus we are merely advised that the 20.625 cent "just and reasonable" rate for onshore gas delivered prior to January 1, 1965 is the "settlement level in accord with *Union Texas* cases, 32 F.P.C. 254 (1964)" (J.A. II, 652, n. 138). This settlement level, however, was above the 20.0 cent/Mcf price the Commission eventually determined was the appropriate rate at which sales should be certificated in the *Union Texas* case, and that rate, in turn, did not purport to be a just and reasonable rate but was merely

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[15] [Continued]

Opinion No. 598

All Flowing gas deliveries:	Onshore	Offshore
Prior to January 1, 1965	20.625	19.625
January 1, 1965-September 30, 1968	21.25	20.25
October 1, 1968-January 1, 1971	"30.5% of the difference between revenues for this period based on rates in effect prior to October 1, 1970 and the revenue which would have resulted for this period through application of rates established in Opinion Nos. 546 and 546-A, as modified by Opinion No. 567."	
After January 1, 1971	22.375	21.375

the "in-line" rate established pursuant to this Court's mandate in the *CATCO* case, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, without any consideration of producer costs, pending the area rate determinations. See *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223 (1965), *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968). Moreover, as Commission Opinion No. 598 carefully refrains from adding, the "settlement rate" for *offshore* gas in the *Union Texas* case was not the 19.625 cent/Mcf rate fixed in Opinion No. 598 for deliveries of offshore gas prior to 1965, but 0.5 cents lower.

The Commission's explanation for the just and reasonable levels Opinion No. 598 made applicable to deliveries between January 1, 1965 and September 30, 1968 is equally irrelevant to the issue before it. The 21.25 cent price for onshore deliveries in this period fixed in Opinion 598 is justified as being the "same rate established in Statement of General Policy 61-1, 26 F.P.C. 661 (1961)" [16] (J.A. I, 653). But this rate, established as a non-binding guideline for certificating new sales prior to the time the just and reasonable rates could be determined, had been recognized by the Commission as obsolete in in-line price proceedings long before the Commission's 1954 decision in *Union Texas*, *supra*. Its use as a surrogate for a just and reasonable rate for a period after *Union Texas* is totally without merit.[17]

Finally, there is not and cannot be any justification for the "just and reasonable" level governing refunds between October 1, 1968 and January 1, 1971, which, (as the set-

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[16] The 1967 date given in the printed Joint Appendix is a typographical error.

[17] As was the case with the price levels set for pre-1965 deliveries, the offshore price under the Statement of Policy 61-1 was 0.5 cents *below* that set for 1965-1968 deliveries of offshore gas in Opinion No. 598.

tlement agreement (J.A. II, 692-693) makes clear), frankly geared to a calculated percentage (30.5%) of the difference between two specified revenue levels, in order to reach the predetermined result that any refunds should be limited to $150,000,000.[18] It is true, as the Commission Opinion states (J.A. II, 654), that the complex formula might have been stated as providing for refunds of all deliveries at rates in excess of "a newly established rate for that period". But such a rate, since its sole objective was to preclude refunds above the $150,000,000 settlement limit, would have been equally without support.

It should be noted that these rate levels cannot be justified by applying appropriate increased rate of return and exploration and development costs to the rates prescribed as just and reasonable in Opinion No. 546 and affirmed as such in *Austral*. While the Commission does not bother to state in Opinion No. 598 what higher rates of return or increased "E & D" expense figure it now believes would have been appropriate in Opinion No. 546, obviously they could not be in excess of those it utilized in fixing the prospective flowing gas rates in Opinion No. 598. If, however, we utilitze the 13% rate of return found appropriate for flowing gas in Opinion No. 598 (See J.A. II, 647), and substitute the 5.47 cent/Mcf E&D expense figure used therein (*Ibid.*), for the 3.55 cents/Mcf E&D expense figure used in Opinion No. 546 (40 F.P.C. 530 at 699) the total increase in cost is only 2.4 cents per Mcf. This would result in an onshore cost for first vintage gas of 20.8 cents, slightly in excess of the onshore price fixed for deliveries through January 1, 1965, but well below the rates submitted for all three subsequent periods. And the resulting offshore price of 19.3 cents per Mcf would be well below all levels estab-

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[18] The percentage may be increased up to 33% to the extent it proves necessary to bring the total refund obligation to within one percent of the $150,000,000 figure (J.A. II, 662).

lished for such gas in Opinion No. 598. Acordingly, it cannot be contended that the settlement levels approved by the Commission were a reasonable approximation of what would have resulted from such a modification of the earlier rate levels assuming it was proper for the Commission to retrospectively modify two facets of an affirmed final rate determination.[19]

The court below made no attempt to defend the Commission's actions on its merits. Instead, it supports the substantive decision to eliminate the quarter of a billion dollar in refunds for overpayments on grounds (1) that the stipulated amount of the refunds—$150,000,000—is more than would have been provided if the just and reasonable rates established in Opinion 598 for flowing gas for the periods subsequent to October 1, 1968 had been made applicable to the prior periods, and (2) that, in any event, the Commission under the terms of Section 4(e) has virtually unlimited discretion in determining whether to order refunds (Mob. Pet. App. 44-45, 463 F.2d at 904-905). Neither of these contentions are sound.

The short answer to the lower court's first contention is that the Commission Opinion does not conclude, or even suggest, that the just and reasonable rates for flowing gas it fixed for periods after October 1, 1968 were applicable to such gas during earlier periods. On the contrary, it specifies lower levels therefor, albeit levels higher in each case than those fixed in Opinion 546. Nor

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[19] The Commission does not, and in our opinion cannot, claim that its present conclusions on rate of return and E & D expense demonstrate its previous ones were legally erroneous. On the contrary, with respect to the increased E & D expense, which accounts for 80% of the overall cost increase, the Commission agreed that both the new and old methods of calculating had inherent deficiencies, but thought it appropriate to accept the staff recommendation that it utilize the higher cost method of calculation it had rejected in previous cases since any miscalculation was within the margin for error of the other cost components (J.A. II, 646).

is this a case where (leaving aside the Commission's unexplained lumping of the less costly first vintage gas of Opinion No. 546 with the higher cost second vintage gas) it can be presumed that just and reasonable levels appropriate for periods subsequent to October, 1968, were valid in earlier periods as well. On the contrary, the Commission's higher rates for both new and flowing gas in Opinion No. 598, and the fixed escalations thereof in 1974 and 1973, respectively (J.A. II, 657), are predicated on its findings that the costs for both categories of gas have been steadily increasing over the last decade (See J.A. II, 638, 647).[20]

The Court's suggestion that the Commission's elimination of $225,000,000 in refunds owed gas consumers can be upheld, without reference to the basis of the Commission's action, since the Commission has unlimited discretion under the Natural Gas Act to order or not to order refunds is, if anything, even less valid. In the first place, the Commission did not claim to be waiving its rights to order $225,000,000 in refunds for sales in excess of the just and reasonable rate. Its position—which the Court ignored—was that it had retrospectively concluded these revenues were within just and reasonable limits. We do not, however, agree with the lower court's proposition that, where the Commission has found that the gas consumers have paid more than the just and reasonable rate, it can if it sees fit, permit the offending natural gas company to keep the revenues it unlawfully[21]

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[20] In the Commission's original *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159, 228, affirmed on this point, *Permian Basin Area Rate Cases, supra*, 390 U.S. at 788, and in *Southern Louisiana I*, 40 F.P.C. at 637, affirmed on this point *Austral, supra*, 428 F.2d at 430, the Commission had justified maintaining the rates for its several vintages at the same level, and imposing limited moritoria on any increases, on grounds that the record in those cases indicated that costs had been relatively constant over a period of years.

[21] Section 4(a) of the Natural Gas Act, expressly makes "unlawful" the changing by any natural gas company of a rate for a

secured. Since there is no private right to reparations under the Natural Gas Act (see *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618), it is peculiarly important that the Commission exercise its refund powers to afford consumers the "complete, permanent and effective bond of protection from excessive rates and charges" which this Court in the *CATCO* case, *supra*, 360 U.S. at 388, held was the objective of the Act.[22] Arguably there are situations where the Commission's obligation to gas consumers can better be met other than directing immediate refunds. But, see *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 155. This is what the court in *Austral* purported to give the Commission an opportunity to explore on a new record. But there is no basis for asserting that the

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sale in interstate commerce for resale which "is not just and reasonable".

[22] The cases cited by the lower Court do not hold that the Commission properly may forego ordering refunds of rates collected under suspension despite its conclusion that the rates charged were above just and reasonable levels, to say nothing of suggesting that it has unreviewable discretion to do so. *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F.2d 182 (5th Cir., 1971), upheld an order directing a producer who had illegally abandoned service to a pipeline after the jurisdictional nature of the sale became apparent to make refunds to the initial price for the period prior to abandonment, and an amount after abandonment sufficient to make the pipeline whole for the increased costs it had incurred. *Continental Oil Co.* v. *Federal Power Commission*, 378 F.2d 510. (5th Cir., 1967), certiorari denied *sub nom.*, *Austral Oil Co.* v. *Federal Power Commission*, 391 U.S. 917 and *Public Service Commission of New York* v. *Federal Power Commission*, 329 F.2d 242 (D.C. Cir., 1964), certiorari denied, *sub nom. Prado Oil Co.* v. *Federal Power Commission*, 377 U.S. 963, both involve situations where the Commission was held to have authority to order refunds for producers who had been operating under temporary certificates with no express refund obligation, at prices which the Commission later determined were above in-line levels. See *United Gas Improvement Co.* v. *Callery Properties, supra; Federal Power Commission* v. *Sunray DX Oil Co., supra* (making clear that a valid permanent certificate establishes a floor for subsequent refunds even if the just and reasonable rate is found to be below this level).

Commission's action here, which is not and could not be based on any such claim, is justifiable because of what it might have done under different circumstances, and thus need not be suppported in its own terms. See *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80.

II. THE HUGE NON-COST INCENTIVE PROVISIONS FOR INCREASING THE RATES OF FLOWING GAS ARE UNSUPPORTED BY FINDINGS OR EVIDENCE AND UNDULY DISCRIMINATORY

The Commission, in approving the industry supported settlement in Opinion No. 598, did not limit itself to an increase in rates for new onshore and offshore gas sales of six and seven and one-half cents, respectively, over those fixed three years earlier in Opinion No. 546, or the similar increases ranging from two and three-eights cents to five and three-eights cents in the flowing gas rates. The new rates for both new sales and flowing gas were expressly set at the high end of so-called cost ranges (and in the case of flowing gas some 1.2 cents higher) as a non-cost incentive to additional area exploration and development (J.A. II, 642, 647).[23] But the Commission's Opinion, in addition to remitting a quarter of a billion dollars in refunds owed under Opinion No. 546, provides for contingent escalations of the new flowing gas rates which we calculate could cost gas consumers up to an

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[23] The court of appeals in the *Texas Gulf Coast* case, *supra*, held that the fixing of the base rates in that case in a similar manner was invalid, since the need for any non-cost supplement or the amount thereof had not been based on adequate findings supported by the record. 487 F.2d at 1087-1090. New York has not, however, challenged the Commission's base rates in its present petition for review, since, while we do not necessarily agree with all of the Commission's conclusions which led to these rates, we are of the opinion that they might be approximated by a proper order.

additional $750,000,000,[24] and for the write off of the remaining $150,000,000 in the refunds which are due under its present order. Similar provisions contained in the Commission's contemporaneous Opinion No. 595 in its *Texas Gulf Coast Area Rate Proceeding*, 45 F.P.C. 695, were recently rejected by the District of Columbia Circuit in its Opinion in the *Texas Gulf Coast* case, *supra*, 487 F.2d at 1068-1079. For the reasons set forth below we are convinced that the District of Columbia Court's opinion on these issues is equally applicable to the contingent escalations involved in the present case and that its decision, rather than the discussion of the issues in the Court below, properly states the governing law.

A. The Contingent Escalation of Flowing Gas Rates

The settlement agreement endorsed by the Commission provides that flowing gas rates will be increased in a series of steps, upon the dedication of specified amounts of new gas reserves to the interstate market, with the full 1.5 cents being applicable at such time prior to October 1, 1977 as new gas dedications in the area since October 1, 1968 total 15 Tcf (trillion cubic feet of gas).[25]

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[24] The $750,000,000 bonus figure has been based on the following calculations. At the end of 1968 there were about 66.1 trillion cubic feet of gas dedicated to interstate pipelines in the Southern Louisiana area. See *The Gas Supplies of Interstate Natural Gas Pipeline Companies, 1968*, FPC, Bureau of Natural Gas, January, 1970. Some of that flowing gas will have been depleted, of course, by the time enough new gas could be found to generate the bonus; but there will also undoubtedly be additions of developmental reserves that will be subject to the flowing gas ceilings and to the bonus. Accordingly, we estimate that there may be about 50 trillion cubic feet of flowing gas entitled to the penny and one-half bonus if and when the producers find the necessary new gas. This equals $750,000,000 payable on account of finding 15 trillion cubic feet of new gas, or an extra 5 cents per Mcf.

[25] At a level of 7.5 Tcf of new dedications, flowing gas rates escalate by 0.5 cents, and they increase by an additional 0.5 cents when new dedications reach 11.25 Tcf.

While this may appear on the surface to be a lot of gas to be dedicated over the *nine* year period, it is in fact less than half as much as the total new reserves which were in fact dedicated from the Southern Louisiana area during the *five* years 1965-1968 (J.A. II, 623), and only one quarter of the new reserves from the area which the Commission in Opinion No. 598 found would be necessary in the *seven* year period 1971-1977 in order to maintain a reasonable level of service (*ibid.*). In short, the Commission was persuaded to provide producers with up to three quarters of a billion dollars in excess revenues as an incentive for doing less than they had done in previous periods and far less than the Commission thought was required for the future.

A. For the reasons so clearly elucidated in Judge Leventhal's Opinion in the *Texas Gulf Coast* case, *supra*, as set out *in extenso* at pp. 23-25, *supra*, New York believes that the basic theory that increases in flowing gas rates are necessary or even useful in enhancing the producer's future exploratory and development activities is inherently unsound. This is particularly true in the context of the Commission's express finding in Opinion No. 598 (J.A. II, 642) that the 26 cent "rate for new gas . . . in our judgment is at an appropriate level which will elicit exploratory and development effort in Southern Louisiana." But even assuming that the theory of the contingent escalations of flowing gas rates could be adequately supported by the Commission—as it has not attempted to do in either Opinion No. 598 or No. 598-A—and its particular plan therefor did not involve the patently discriminatory aspects discussed below, it would be apparent that the amount of the escalation in relation to the necessary or potential gas supply which would be likely to be induced thereby, would have to be an essential aspect of any Commission justification before any such huge expense could properly be imposed upon gas consumers.

The Court will, however, look in vain in either Opinion No. 598 or No. 598-A for any Commission consideration of this key question, despite the fact that the lack of support for the amount of the escalation in relation to these new dedications required to "trigger" its payment was expressly raised by New York among others (see J.A. I, 269, 283; II, 845-846). Except for general statements that it has virtually unreviewable discretion in considering settlement proposals to accept the "rate design" embedded therein, "in the light of the quasi-bargaining position of the parties" (J.A. II, 597, 870-871), the Commission's opinions gave no indication that it even gave consideration to fixing the triggering level of the contingent escalation at any level other than that set out in the settlement proposal. And while New York raised this matter again in its briefs below,[26] the lower court's discussion of the contingent escalations completely fails to direct itself to the issue. (see Mob. App. Pet. 49-51, 483 F.2d at 908).

B. The contingent escalation provisions of Opinion No. 598 are admittedly highly discriminatory. Producers will secure revenues thereunder not in relationship to their future efforts but entirely on the basis of the extent of their sales prior to October 1, 1968. As a result, there will be no necessary correlation between the increased costs imposed upon particular pipelines and the new gas dedicated thereto. And since the benefits of the Commission's scheme will abound solely to the large producers with established positions in the Southern Louisiana area, it will severely discriminate against new entrants into the market and seriously denigrate from the validity of the Commission's finding (for which it typically provides no support), that its decision "should attract new entrants to the industry. Thus, . . . we find our orders

[26] See, PSC Brief in Case Nos. 71-2761, p. 31; PSC Reply Brief, pp. 12-13.

should have an overall tendency to be pro-competitive" (J.A. II, 629).[27]

Neither the Commission, nor the Court below, gave any express recognition to what the Court in the *Texas Gulf Coast* cases, *supra*, properly described as a "situation in which there is no inherent relationship between the consumers assigned the burdens and those deriving the benefits of a government pricing provision" 482 F. 2d at 1077. It simply is not good enough for the Commission to fall back on generalizations that "no scheme [of area regulation] can be free of some inequities" (J. A. II, 601). This is particularly the case since, on rehearing, it rejected a proposal which would at least have tied the flowing gas increases for particular producers to the future dedications they make on grounds that while it had "much to commend it" it had not been included in the "settlement package" (J.A. II, 874, see also J.A. II, 600-601). The simple fact is that the Commission made no attempt to consider non-discriminatory or less discriminatory alternatives to the settlement plan, because it was "influenced by the breadth of the support given the settlement proposal" (J.A. II, 870) and erroneously concluded acceptance of the package would "reduce the probabilities for future litigation" (J.A. II, 601).

The lower court's discussion of the discriminatory features of the contingent escalation, (as indicated it ignores our attack on the need for, or utility of escalations at these levels), is equally sterile. Its witticism that an ad-

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[27] The necessity that the Commission's rate structure for the major Southern Louisiana producing area be in fact "pro-competitive" is emphasized by data recently released by the Commission indicating that as of mid-1972, the four largest producers of natural gas between them controlled no less than 48.4% of the reported uncommitted gas reserves in the United States, excluding Alaska. See, *Statement of John N. Nassikas, Chairman, Federal Power Commission, before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, June 20, 1973, Table 7.

ministrative decision is not to be rejected "because one party may get icing on its cake, while another gets only cake" (Mob. Pet. App. 50, 483 F.2d at 908), is small comfort to consumers who in addition to paying for the cake are being asked to provide three quarters of a billion dollars in icing. Its reference to refund obligations (Ibid.) is irrelevant. And its statement that the fears of consumer groups should be allayed rather than excited since "the revenues generated by the increased rates will actually go into exploratory and development drilling for new production and reserves" (*Ibid.*) is simply incorrect. On the contrary, as New York, for one, pointed out in its brief below, under the Commission approved scheme, producers with large flowing gas sales in the area, can withdraw from the gas production business entirely and still secure the benefits of the Commission's largesse.[28]

In short, we have a non-cost bonus, amounting to many hundreds of million dollars, which has been approved by the Commission solely because it was part of the settlement proposal, with no effort to support the need therefor or the level of the particular price increments in relation to past or future production trends or needs, and no consideration as to whether the patently discrim-

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[28] The court also "fail[ed] to see" why new entrants should be discouraged from entering the market at the 26 cent new gas price, merely because the entrenched producers in addition to this price would reap huge bonuses from their flowing gas sales (483 F.2d at 908). This, of course, ignores the fact that the flowing gas bonus puts the existing producer in a better position to bid for the offshore leases. In fact, the result of the plan's discriminatory nature has been to induce the Commission to grant rates of up to 45 cents per Mcf to producers with little or no existing sales in the area who are therefore prepared to give up their, at most, nominal right to the contingent escalations in return for much higher prices for their new sales. See, *e.g.*, *Belco Petroleum Corp.*, —— F.P.C. ——, Opinion No. 659, issued May 30, 1973, pending on review, *Consumers Union of the United States, et al.* v. *Federal Power Commission*, Case Nos. 73-1792 *et al.* (D.C. Cir.).

inatory aspects of the particular plan could not be eliminated or mitigated. It is therefore, quite unnecessary to speculate whether other non-cost incentive programs of this magnitude might be justifiable to conclude that the present Commission determination must be set aside.[29]

B. The Refund Write-Off

While the Commission approved settlement still left refund obligations totalling $150,000,000, their immediate payment was not ordered. Instead, the producers with such obligations were provided the option (which they have virtually all accepted) of "working off" their obligations over a period through October 1, 1977, at the rate of one cent of refund obligation for each Mcf of new gas dedicated to the interstate market. However, there is no requirement that the new gas commitments be made to the pipeline that had paid the excess rates or to the consumers who had carried the burden thereof. See *Texas Eastern Transmission Co.* v. *Federal Power Commission*, 414 F.2d 344 (5th Cir., 1969), *certiorari denied*, 398 U.S. 928. On the contrary, 50% of the refund obligation of any producer may be discharged by sales to other pipelines (J.A. II, 666).[30] And the entire refund obligation

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[29] While we do not believe there is anything in the Commission's record which would provide an adequate factual predicate for the contingent escalation scheme it approved, we point out the Commission had expressly reopened the record to permit sponsors of the settlement agreement to provide supporting testimony (J.A. I, 352-354). However, aside from testimony as to the mechanics of the settlement agreement, no such supporting evidence was introduced relating to the contingent escalations.

[30] Moreover, a creditor pipeline will not obtain any reserve credit against the refunds owed to it if it rejects a producers "bona fide" offer of sale (J.A. II, 666-667). This term is not defined in either the Commission's Opinion or in the settlement. Even if it is not subsequently construed to permit producers to avoid their refund obligations by seeking preferential terms for their gas, the pipeline may lose its entitlement if it is not in a position to take gas offered to it at a specified location at a particular time.

may be forgiven by the Commission if the producer shows that it made a dilligent though unsuccessful effort to secure new gas reserves. (J.A.II, 667)

It is apparent that this refund write off scheme, whatever its other justification, is discriminatory both among producers and between pipelines and consumer groups. The main beneficiaries are those few producers (the record shows that about 40% of the refunds are owed by just four producers (J.A. V, 268e, 263e-264e)), who have collected rates over the years, subject to refund, at rates even in excess of the inflated "just and reasonable" levels set to reduce the total obligation by 60% (see Part I, *supra*) ; they are in effect awarded therefor with a 27 cent rate for their new gas. The theory of the Commission, to the limited extent it is enuciated, appears to be that tying the refund write off to the specific dedication of new gas reserves by the individual producer, will induce him to dedicate any new reserves he develops to the interstate market (J.A.II, 654). But this concept has no meaning with respect to the offshore areas in the Gulf of Mexico in the federal domain from which most of the new area production is expected to come, since all gas sold from these areas are in interstate commerce and as such subject to the plenary jurisdiction of the Commission. And it is, to say the least, naive to believe that many producers will sell onshore gas to the interstate market at 26 cents per Mcf, in order to secure a one cent per Mcf reduction in their refund obligations, when ongoing prices for gas in this unregulated market are and have been at least double the regulated price. INTRASTATE

As in the case of the contingent escalations, the Commission makes little effort to defend its proposal against the objections raised by New York and others except to suggest that it was part of a "complex rate design package" and its "policy decision" to accept the settlement plan in view of the "breadth of the support given" to it

is essentially unreviewable. (J.A. II, 870). Similarly, we are advised that "once higher revenues are conceded as being necessary, the Commission is entitled to consider both the question of how much, and how they are to be spread in the light of the quasi-bargaining position of the parties." (J.A. II, 597). We do not see how such "anti-findings" can conceivably be treated seriously as justification for the necessity for converting $150,000,000 in overcharges admittedly made by some of the producers into a bonus for these very producers.

Aside from some purely conclusionary findings (J.A. II, 654), however, the only other statement the Commission makes in defense of its action is that "available capital will not be diminished by requiring immediate cash refunds" (J.A. II, 627). As we have already indicated, *supra*, pp. 25-26, a showing, of the type not made here, that immediate refunds would actually diminish necessary capital resources for an optimum search effort might justify their deferral, or repayment over a period or years or through a reduction in other revenues. It would not, however, justify any write off scheme merely because it was included as part of a "settlement package," to say nothing of one like the present one which is consciously discriminatory in its impact.

The court below virtually ignored the consumer arguments that the refund write off provisions of the Commission's order discriminate against the pipelines who paid the overcharges, saying only that "even if there are some minor infirmaties, we are unwilling to reject a program which provides an obvious positive stimulant for cultivation of reserve possibilities" (Mob. Pet. App. 49, n. 33, 483 F.2d at 907, n. 33). This is, we suggest, clearly not adequate in the light of a Commission failure to either support the allegedly stimulative effect of the write off by specific findings based on any factual predicate, or to consider modification of the settlement proposal to eliminate its most egregiously discriminatory features.

Nor can the lower court's response to the discrimination claims by the producer appellants, in terms of the fact that any area rate determination treats individual producers differently, and that the Commission has discretion as to whether to order refunds, properly support the Commission action. It is one thing to conclude, as this court did in the *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 768-77, that *uniform* rates established for all of the producers in a given production area are appropriate under the Natural Gas Act although their impact will vary from producer to producer,[31] and quite another to deliberately provide some of the area producers with what amounts to higher rates than others because they had charged higher rates in the past. As the court stated in the *Texas Gulf Coast Cases*, *supra*, in response to a similar Commission contention that, since it could refuse all refunds, the discriminatory features of a particular plan were not judicially recognizable, any such exercise of agency discretion which results in "thwarting rather than effectuating the policies behind the Act, as expressed in Section 4 as to refund obligations, and in Section 5 as to the prohibition of undue preferences" requires, as a minimum, a dilligent assessment of the consequences of its action and a determination of whether its discriminatory features were avoidable. See 487 F.2d at 1078-1079. This is exactly what the Commission failed to do here.

III. THE COMMISSION ERRED IN PRICING CASINGHEAD GAS AT THE SAME LEVELS AS GAS WELL GAS

Casinghead gas "was, is, and will be a by-product of oil finding and production operations." *Southern Louisiana*

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[31] This Court made clear that the validity of uniform area rates depended in part upon the right of individual producers to seek exceptions to the area norms. See 390 U.S. at 770-771.

I, 40 F.P.C. at 590. In past decisions the Commission had uniformly held that it was inappropriate to cost casinghead gas for ratemaking purposes and that this type of gas should not receive the higher prices allowed more recent vintages. *Permian*, 34 F.P.C. 159, 209; *Southern Louisiana I*, 40 F.P.C. 530 and 41 F.P.C. 301, 315. In Opinion No. 546-A, the Commission explained (41 F.P.C. at 315):

> "[W]e can perceive no justification for continuing to allow the more recent vintages of this gas to command a price which is based in part on an additional allowance which includes an incentive for increased exploration and development and which is predicated on the industry's directional exploration capability. Moreover, while we have consciously refrained from attempting to define the cost of casinghead gas, we are well aware that its indicated cost is substantially below that of gas-well gas."

The Commission here has reversed its position, without any valid justification. It apparently recognizes the plain economic fact that casinghead gas costs substantially less to find and produce than gas-well gas, but attempts to justify its position on the basis that price equality will prevent diversion of such gas to the intrastate market (J.A. II, 651). The Commission's position, which the Court below accepted (Mob. Pet. App. 53; 483 F.2d at 909), fails to consider that casinghead gas from the offshore Federal domain, the primary source of new gas, is by definition in the interstate market and subject to Commission regulation. Hence, diversion from the interstate market would require Commission sanction. And, with respect to onshore casinghead production there is nothing to indicate that the intrastate market will not always be able to outbid the interstate market for any category of new gas whatever ceiling is fixed by the Commission. The result is that raising the price on casinghead gas will benefit producers, but will not signifi-

cantly aid interstate consumers in securing additional gas, even at the inflated prices involved.

In its order on petitions for rehearing, the Commission sought to justify its switch on the ground that casinghead gas is being flared (J.A. II, 871). To be sure, a staff witness testified that a higher price might result in marketing some of the gas being flared because it might justify addition of some compression facilities. The record is silent, however, as to whether any substantial gas is being vented offshore. As to any onshore gas being vented, there is no reason to assume that the gas hungry intrastate market would not provide any price incentives needed to avoid flaring.

In any event, the generalized statement that a higher price could result in less flaring does not support any particular price increase or show that a particular rate would be sufficient to avoid flaring. Since the justification is based on the alleged need for more compression at particular facilities, the proper solution would be to provide for special exemptions from the area rate ceilings in such circumstances, rather than to provide a windfall for all casinghead gas. Specific procedures to take care of this flaring problem on a case by case basis have in fact subsequently been adopted by the Commission. See Flaring and Venting of Natural Gas, Docket No. R-459, Order of April 12, 1978, 38 F.R. 9995; Section 2.77 of the Commission's General Policies and Rules, 18 C.F.R. § 2.77.

IV. THE CONSIDERATION GIVEN BY THE COMMISSION TO A SETTLEMENT PROPOSAL SPONSORED BY SOME OF THE PARTIES TO THE PROCEEDING BUT CONTESTED BY OTHERS WAS IMPROPER

The Commission here accepted over the objections of a number of parties, including New York, all the terms

of a settlement proposal formally sponsored by certain large distribution companies and supported by many other distribution companies, pipelines and producers. While the Commission purports to justify each of its order's provisions on their independent merits, it is apparent, as we have shown in our arguments above, that much of the order, and particularly non-cost bonus provisions, are buttressed by nothing more than the settlement proposal. We are convinced this constituted an improper delegation by the Commission of its responsibilities under the Natural Gas Act to the industry it was established to regulate.

The right and in fact obligation of the Commission to give full consideration to the specific terms of proposals for the settlement of formal proceedings, even where there is no general agreement among the parties to the Commission proceeding and the proposal or parts of it are opposed by various parties, has been asserted by a number of court of appeals decisions. See *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204, 224-226 (D.C.Cir., 1960), certiorari denied, *sub nom.*, *Panhandle Eastern Pipeline Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913; *Pennsylvania Gas and Water Company* v. *Federal Power Commission*, 463 F.2d 1232 (D.C. Cir., 1972); *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir., 1972). The principle, with which we do not take issue, that has been established in these cases, is that the Federal Power Commission should consider such proposals on their merits. But their status is essentially that of a brief, and the individual provisions, at least to the extent they are contested, can be affirmed by the Commission only on the basis of detailed findings based upon substantial record evidence. The Commission in apparent recognition of these requirements, specifically reopened the record in the present case to provide the sponsors of the proposed settlement with an op-

portunity to place into the record testimony supporting its specific provisions (J.A. I, 352-359). Unfortunately the invitation was, in the main, not accepted.

Despite the Commission's express acknowledgement that the specific provisions of the settlement proposal here could be adopted over the reasoned objections of other parties only on the basis of detailed findings based upon the record, it has, as we have shown above, repeatedly accepted specific provisions, despite their acknowledged deficiencies, solely because they were part of the "settlement package". It has done so even where there was no record support for the particular proposal. Moreover, in the section of its Opinion entitled "The Rationale for Acceptance of the Provisions of the Settlement Agreement" (J.A. II, 593-601), it goes so far as to say "once higher revenues are conceded as being necessary, the Commission is entitled to consider both the questions of how much and how they are to be spread *in the light of the quasi-bargaining position of the parties*" (J.A. II, 597), and that the "broader acceptability of the [settlement] proposal with the distributor group [32] impells us to act as we do" (J.A. II, 601). And on rehearing it frankly admitted to being "influenced by the breadth of the support given the settlement proposal in selecting the rate design proffered to us" (J.A. II, 870), a statement which, it makes clear, includes its acceptance without modification

[32] Both the Commission and the court below consistently attempt to clothe the distributor parties in the proceeding with the mantle of spokesman for gas consumers. Unfortunately, while distribution companies frequently served in this capacity in periods where gas was plentiful and the basic problem from their business standpoint was whether the price was low enough to permit them to resell gas in competition with other fuels, this no longer is the case. With the decrease in gas supply and the increase in demand for gas for air pollution purposes and because of shortages or price increases in alternate fuels, the distributors can now pass on all increased costs to willing customers. With limited exceptions, they are now closely aligned with the producers and pipelines in supporting ever higher prices of gas.

or serious analysis of all of the non-cost additions to the settlement's base rates.

In making this all or nothing choice, the Commission was apparently persuaded by the section of the settlement proposal in which the producer signatories made a carefully guarded representation of their belief that adoption of the provisions of the proposal as a whole would make a "major contribution to bringing forth additional supplies of gas from the Southern Louisiana area to meet the demands of all consumers supplied by this area" (J.A. II, 630, 701-702). The Commission may have felt that if it were to depart in any significant respect from the proposal in which this modest expression of optimism —but no guarantee of action—was imbedded, this would lead the producers to shift the blame to it if results are less than hopes. Whether or not is is a valid analysis of the situation, it cannot constitute a proper basis for Commission action. For it is upon the Commission, not the industry or significant sections thereof, that Congress imposed the obligation to ensure that natural gas is sold "at the lowest possible reasonable rate consistent with maintenance of adequate service in the public interest," *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388.

CONCLUSION

For the reasons set forth above, the Commission's Opinions and Orders in this proceeding are unlawful to the extent indicated and the opinion below must be reversed with instruction to direct the Commission to take appropriate action to eliminate the illegal provisions of its Order.

Respectfully submitted,

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